

<sup>1</sup> Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, appellant asserted that oral argument should be granted because OWCP's decisions were based on inaccurate and incorrect information and the decisions failed to provide reasons why her arguments and evidence submitted were insufficient to modify OWCP's denial of her claim. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied, and this decision is based on the case record as submitted to the Board.

the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.

### **ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts and circumstances as set forth in the Board's prior decisions and orders are incorporated herein by reference. The relevant facts are as follows.

On June 9, 2005 appellant, then a 50-year-old management analyst, filed an occupational disease claim (Form CA-2) indicating that years of repetitive typing, writing, and use of the adding machine and computer caused or aggravated cervical spine arthritis and bilateral carpal tunnel syndrome (CTS) while in the performance of duty. She first became aware of her claimed conditions and its relationship to her federal employment on March 30, 2005. OWCP accepted the claim for bilateral CTS, bilateral lesion of the ulnar nerve, and non-disabling mild dysthymic disorder. Appellant underwent OWCP-approved left carpal tunnel and cubital tunnel release on January 11, 2007 and right carpal tunnel and cubital tunnel release on June 7, 2007. She returned to full-duty work with use of voice-activated software on February 14, 2008. OWCP paid appellant intermittent wage-loss compensation on the supplemental rolls commencing March 30, 2005.<sup>4</sup>

On June 22, 2010 appellant filed a notice of recurrence (Form CA-2a) claiming a recurrence of the need for medical treatment due to a change or worsening of her accepted work-related conditions. She noted that she received several accommodations, but she had been doing "an overwhelming amount of keyboarding and using [her] hands to lift, turn pages, write, *etc.* at work," which aggravated her approved bilateral carpal and cubital tunnel syndrome conditions, and caused stress and depression. Appellant indicated that the shooting finger and arm pain caused her to take more daily pain medications, including prescription pain medications. She also indicated that her doctors advised her to retire as she was totally disabled from performing her job. In a July 12, 2010 letter, OWCP advised that, since appellant did not claim any lost time from

---

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> Docket No. 15-548 (issued May 13, 2015).

<sup>4</sup> By decision dated October 22, 2008 and corrected on November 14, 2008, OWCP issued a schedule award for 25 percent permanent impairment of the right upper extremity and 26 percent permanent impairment of the left upper extremity for which appellant received a requested lump-sum award on January 13, 2009. Appellant requested increased schedule awards, which OWCP denied in decisions dated October 30, 2009 and February 17, 2010.

work, she had not experienced a true recurrence. It noted her claim remained open for medical treatment of her accepted conditions.<sup>5</sup>

On December 2, 2010 appellant submitted a Form CA-2a claiming a recurrence of disability and the need for medical treatment, wherein she listed the date of recurrence as June 22, 2010 and related that she had stopped work on July 27, 2010. By decision dated January 12, 2012, OWCP denied the alleged recurrence of June 22, 2010. The weight of the medical evidence was accorded to Dr. Stuart J. Gordon, a Board-certified orthopedic surgeon and OWCP second opinion physician. The claim remained open for medical treatment of the accepted conditions.

On January 30, 2012 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated May 23, 2012, an OWCP hearing representative vacated the January 12, 2012 decision and remanded the case for further development, including the issuance of an updated statement of accepted facts (SOAF) and referral to a Board-certified psychiatrist for examination and evaluation.

Following further development, appellant underwent a second opinion psychiatric examination on December 19, 2012 by Dr. Dennis M. Young, a Board-certified psychiatrist, who provided reports dated December 22, 2012 and February 7, 2013. Dr. Young opined that appellant's depression was not the result of pain associated with the work injury.

By decision dated March 28, 2013, OWCP denied appellant's recurrence claim as she had not established that she was disabled due to a material change/worsening of her accepted work-related conditions. It also found that her diagnosed depression was not causally related to the original occupational conditions, but rather was self-generated as a result of her perception that she was an undervalued and marginalized employee.

On March 14, 2014 appellant, through counsel, requested reconsideration based on new evidence from Dr. John R. Lion, a Board-certified psychiatrist. OWCP subsequently declared a conflict in medical opinion between Dr. Young and Dr. Lion, who opined, in his February 3, 2014 report, that appellant's depression was the result of her work injury.

OWCP referred appellant to Dr. Bruce M. Smoller, a Board-certified psychiatrist, for an impartial medical examination and evaluation as to whether her employment-related conditions contributed to or caused a psychiatric condition. In a July 27, 2014 report, Dr. Smoller, serving as the impartial medical examiner (IME), reviewed a SOAF, examined appellant's medical record and appellant, and noted the history of injury. He recounted interview findings and provided an impression of mild dysthymia on a fair to good level of functioning. Dr. Smoller opined that appellant's dysthymia did not need further medical treatment, that she had reached maximum medical improvement, and that no further therapy treatment was required. He reiterated his opinion that she was not disabled from work due to the psychiatric condition.

---

<sup>5</sup> On July 31, 2010 appellant voluntarily retired.

By decision dated August 22, 2014, OWCP accepted the additional condition of non-disabling mild dysthymic disorder. Further treatment for the newly accepted condition was not authorized based on Dr. Smoller's July 27, 2014 impartial medical report.

Also, by decision dated August 22, 2014, OWCP affirmed the March 28, 2013 decision in part to reflect that appellant had not established her recurrence claim due to a material change or worsening of her accepted work-related conditions.

Appellant appealed to the Board on January 15, 2015. By decision dated May 13, 2015, the Board affirmed OWCP's August 22, 2014 decision. The Board found that Dr. Smoller's opinion was entitled to the weight of the medical evidence as an IME as he provided a rationalized medical opinion, which established that while there was psychological component to appellant's work-related condition it did not disable her from working on July 27, 2010. The Board further found that there was no probative medical opinion evidence, which established that appellant had a material change in her medical condition such that she was totally disabled as a result of her accepted work-related conditions beginning July 27, 2010.<sup>6</sup>

Appellant subsequently filed a series of requests for reconsideration. In decisions dated April 10, 2017, August 10, 2018, and October 9, 2019, OWCP denied modification of the merits of the claim. The decisions detailed appellant's legal and factual arguments and found no error or evidence to support the allegations raised. The decisions further found that the medical evidence of record remained unsupported by rationalized medical evidence to demonstrate that the accepted conditions prevented appellant from working on or after July 27, 2010 causally related to the accepted March 30, 2005 employment injury.

On September 9, 2020 appellant requested reconsideration. In an accompanying letter also dated September 2, 2020, she requested reconsideration and a "face to face hearing." Appellant contended that OWCP's merit reviews were based on inaccurate and incorrect information and that OWCP had failed to review the evidence and arguments she provided in all her reconsideration requests. She argued that Dr. Young's opinion was relevant and supported her disability claim, the opinion of Dr. Lion, her physician, supported Dr. Young's opinion, and Dr. Smoller's report was vague and speculative. Appellant also wanted to know why OWCP did not find certain facts, circumstances and evidence relevant to the fact that she had to retire on disability. She alleged that her supervisor and the employing establishment ignored her initial accommodation requests only to grant the same request over a year later. The delay of such accommodation by appellant's supervisor and the employing establishment violated the law and the ineffective accommodations caused appellant excruciating physical pain and mental anxiety, continued use of addicting drugs, and having to perform repetitive motion that caused her recurrence. The only evidence submitted in support of her reconsideration request was a petition for *writ of certiorari* in the Supreme Court of the United States.

In November 18 and December 8, 2020 letters, OWCP informed appellant that, as her September 2, 2020 letter indicated that she was requesting both a reconsideration and "face to face hearing," she could only request one method of appeal. Appellant was informed of her appeal

---

<sup>6</sup> *Supra* note 3.

rights and provided 10 days to respond to the request. On December 11, 2020 she advised that she was requesting reconsideration.

By decision dated January 21, 2021, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.<sup>7</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>8</sup>

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>9</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>10</sup> If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>11</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's August 22, 2014 merit decision. The Board considered that evidence in its May 13, 2015 decision. Findings made in prior Board decisions

---

<sup>7</sup> 5 U.S.C. § 8128(a); *see T.K.*, Docket No. 19-1700 (issued April 30, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

<sup>8</sup> 20 C.F.R. § 10.606(b)(3); *see L.D.*, *id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>9</sup> *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2020). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

<sup>10</sup> *Id.* at § 10.608(a); *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007).

<sup>11</sup> *Id.* at § 10.608(b); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

are *res judicata* absent further review by OWCP under section 8128 of FECA.<sup>12</sup> The Board, therefore, will not review the evidence or arguments addressed in its prior appeal.

Appellant's request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, the Board finds that it did not advance a relevant legal argument not previously considered by OWCP. Appellant's September 2, 2020 letter contained variations of legal and factual arguments previously considered, which revolved around the conflict in medical evidence with Dr. Young and the fact Dr. Smoller's opinion was accorded the special weight provided an IME. The Board previously reviewed the record, detailed the medical evidence as to how the conflict in medical arose and discussed why the reports from appellant's physicians were not sufficient to establish her recurrence claim. The Board also specifically found that OWCP properly afforded the special weight of the medical opinion evidence to Dr. Smoller who found that appellant had a nondisabling dysthymic disorder. As noted above, the findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.<sup>13</sup> In its previous decisions OWCP also addressed appellant's contentions with regard to the employing establishment's accommodations, testimony, and alleged violations under other statutes and found no evidence of error as it related to the subject recurrence claim. Thus, appellant has not raised any new or relevant legal and factual arguments not previously considered. Consequently, she is not entitled to further review of the merits of her claim based on either the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

The Board further finds that appellant did not submit relevant and pertinent new evidence in support of her reconsideration request. The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>14</sup> Appellant submitted a petition for *writ of certiorari* in the Supreme Court of the United States. This evidence does not address the subject recurrence claim and, thus, does not constitute a basis for reopening the claim.<sup>15</sup> No other evidence was submitted. As appellant failed to provide relevant and pertinent new evidence, she is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).

The Board, accordingly, finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

---

<sup>12</sup> *K.K.*, Docket No. 20-1394 (issued July 26, 2021); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

<sup>13</sup> *Id.*

<sup>14</sup> *L.M.*, Docket No. 20-0315 (issued October 8, 2021); *A.J.*, Docket No. 20-0926 (issued January 26, 2021); *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

<sup>15</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 21, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 28, 2022  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board